1-1-2011

Virginia v. Sebelius - Virginia Motion for Summary Judgement

Commonwealth of Virginia

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA,	)	
EX REL. KENNETH T. CUCCINELLI, II,	)	
in his official capacity as	)	
Attorney General of Virginia,	)	
	)	
Plaintiff,	)	
v.	)	
	)	**Civil Action No. 3:10cv188**
KATHLEEN SEBELIUS,	)	
Secretary of the Department	)	
of Health and Human Services,	)	
in her official capacity,	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Virginia State Bar No. 14156
Solicitor General
dgetchell@oag.state.va.us
Counsel of Record

STEPHEN R. MCCULLOUGH
Virginia State Bar No. 41699
Senior Appellate Counsel
smccullough@oag.state.va.us

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

WESLEY G. RUSSELL, JR.
Virginia State Bar No. 38756
Deputy Attorney General
wrussell@oag.state.va.us

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

September 3, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

RULES

LEGISLATIVE MATERIALS

I. INTRODUCTION

On August 2, 2010, this Court denied the Secretary's motion to dismiss for failure to state a claim, stating

> While this case raises a host of complex constitutional issues, all seem to distill to the single question of whether or not Congress has the power to regulate – and tax – a citizen's decision not to participate in interstate commerce. Neither the U.S. Supreme Court nor any circuit court of appeals has squarely addressed this issue. No reported case from any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce. Given the presence of some authority arguably supporting the theory underlying each side's position, this Court cannot conclude at this stage that the Complaint fails to state a cause of action.

(Doc. 84 at 31). Because the Secretary bore "the burden of proving that Plaintiffs' claims fail as a matter of law," the motion to dismiss was denied. (*Id., citing Bennett v. MIS Corp.*, 607 F.3d 1076, 1091 (6th Cir. 2010)).

On August 16, 2010, pursuant to the May 6, 2010 Order of this Court, (Doc. 13), the Secretary filed her Answer. (Doc. 87). Subsequently, the Commonwealth timely filed its motion for summary judgment. Pursuant to Fed. R. Civ. P. 56 (c)(2), the Commonwealth bears the burden to "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Supported by this Court's ruling that "[n]ever before has the Commerce Clause and the associated Necessary and Proper Clause been extended this far," (Doc. 84 at 25), and further aided by controlling authority on the nature and limits of the taxing power, the Commonwealth demonstrates below that it has satisfied its burden.

II. COMMONWEALTH'S STATEMENT OF UNDISPUTED FACTS

Pursuant to Local Rule 56(b), the Commonwealth submits the following statement of facts believed to be undisputed.

1. At the 2010 Regular Session of the Virginia General Assembly, Virginia Code § 38.2-3430.1:1, the Health Care Freedom Act, was enacted with the assent of the Governor. (Doc. 1 at 1 ¶ 1; Doc. 87 at 1 ¶ 2).

2. That statute provides:

> No resident of this Commonwealth, regardless of whether he has or is eligible for health insurance coverage under any policy or program provided by or through his employer, or a plan sponsored by the Commonwealth or the federal government, shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court or the Department of Social Services where an individual is named a party in a judicial or administrative proceeding. No provision of this title shall render a resident of this Commonwealth liable for any penalty, assessment, fee, or fine as a result of his failure to procure or obtain health insurance coverage. This section shall not apply to individuals voluntarily applying for coverage under a state-administered program pursuant to Title XIX or Title XXI of the Social Security Act. This section shall not apply to students being required by an institution of higher education to obtain and maintain health insurance as a condition of enrollment. Nothing herein shall impair the rights of persons to privately contract for health insurance for family members or former family members.

(Doc. 1 ¶ 3; Doc. 87 at 1 ¶ 3).

3. Subsequently, PPACA was enacted into law. 124 Stat. 119, 1029 (2010).

4. Congress expressly stated that the mandate and penalty were essential elements of the act without which the statutory scheme cannot function. (PPACA § 1501; § 10106).

5. The Federal act contains no severability clause. (PPACA *passim*).

6. Kathleen Sebelius in her official capacity is presently responsible for administering PPACA. (PPACA *passim*; Doc. 1 at 3 ¶ 8; Doc. 87 at 2 ¶ 8).

7. Before the act was passed, the Senate Finance Committee asked the Congressional Research Service to opine on the constitutionality of the individual mandate. The Service replied: "Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this Clause to require an individual to purchase a good or a service." Cong. Research Serv. *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis 3* (2009). Similar advice was given by the Congressional Budget Office in connection with the Clinton administration health care initiative. *See The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, CBO Memorandum, at 1 (August 1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.").

8. PPACA passed the Senate on a party line vote with considerable minority protest. *See, e.g.*, Cong. Rec. Nov. 2, 2009 S10965 (no bill); *id.*, S10973 (bill being drafted behind closed doors); *id.*, Nov. 17, 2009 S11397 ("The majority leader has had in his office a secret bill that he is working on that we have not seen yet."); *id.*, S11401 (No Child Left Behind got 7 weeks on the floor – "We don't even have a bill yet"); *id.*, Nov. 19, 2009 S11819 (bill is a shell, not the real one); *id.*, Nov. 30, 2009 S11982 (Official debate

begins); *id.*, Dec. 3, 2009 S12263 (bill has been on floor for 3 days and never has been in committee); *id.*, Dec. 5, 2009 S12487 (majority will not slow down); *id.*, Dec. 11, 2009 S12981 ("We are going to have three Democratic amendments and one Republican amendment voted on, and the Democrats wrote the bill"); *id.*, S12977 (votes on amendments blocked; "In the meantime, this backroom deal that is being cut, which we haven't seen – supposedly it has been sent to the CBO to see what it would cost"); *id.*, Dec. 14, 2009 S13144 ("There is somewhere in this building a hidden bill, known as the manager's amendment, which is being drafted by one or two or three people . . ."); *id.*, Dec. 17, 2009 S13344 (bill is not being given the legislative time it deserves because the polls show a majority of Americans are against it and thus it has become a political nightmare for the majority who now simply want to ram it through before Christmas even though "no one outside the majority leader's conference room has seen it yet"); *id.*, Dec. 22, 2009 S13756 (Nebraska deal); *Id.*, Mar. 10, 2010 H1307 (reconciliation being used because bill could not re-pass the Senate).

9. In contrast, the General Assembly of Virginia passed several identical versions of the Virginia Health Care Freedom Act ("HCFA") on a bi-partisan basis, with margins as high as 90 to 3 in the House of Delegates and 25 to 15 in the Senate. *See* SB 417 Individual health insurance coverage; resident of State shall not be required to obtain a policy, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?101+sum+SB417. At the time of passage of the HCFA, the Virginia House of Delegates contained 59 Republicans, 39 Democrats and 2 Independents, while the Virginia Senate contained 22 Democrats and 18 Republicans. See attached Declarations of Bruce Jamerson and Susan Schaar.

10. Although the mandate does not take effect for several years, PPACA imposes immediate and continuing burdens on Virginia. (Aff. Sec'y Hazel) (Doc. 28).

III. THE MANDATE AND PENALTY ARE BEYOND THE OUTER LIMITS OF THE COMMERCE CLAUSE.

In PPACA**,** Congress appeals only to the Commerce Clause for its claimed power to enact the mandate and associated penalty. But the Supreme Court has never extended the Commerce Clause beyond the regulation of (1) "use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce;" and (3) "**activities** that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (emphasis added). Only the third category has been implicated by the arguments made by the Secretary. (*See* Doc. 84 at 19).

The passive status of being uninsured falls within none of these categories, whether or not that status can be traced back to an "economic decision." In her Answer, the Secretary pleads that the status of being uninsured is "an economic decision" that "has a substantial effect on interstate commerce." (Doc. 87 at 3 ¶ 17). This strange and awkward formulation serves merely to emphasize the correctness of this Court's ruling that the Secretary's position is well outside of the currently established limits of the Commerce Clause. (Doc. 84 at 18, 25, and 31). Although the Commonwealth's position is in accord with existing precedent, acceptance of the Secretary's position would require a change in the existing law.

It is true that the Secretary also pleads that "Congress had a rational basis to conclude that the minimum coverage provision is essential to ensure the success of the [Act's] larger regulation of the interstate health insurance market." (Doc. 87 at 3 ¶ 14). But this is in essence an appeal to the Necessary and Proper Clause, which cannot be employed contrary to the letter and spirit of the Constitution. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Because the

power claimed here would alter the federal structure of the Constitution by creating an unlimited federal power indistinguishable from a national police power, it cannot be a proper use of the Necessary and Proper Clause. *United States v. Morrison*, 529 U.S. 598, 618-19 (2000) ("We always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power."). Because the limits of the power claimed by the Secretary are not judicially discernible, the claimed power is not only contrary to constitutional text and first principles, it is also contrary to binding Supreme Court precedent.

A. The Mandate and Penalty are Contrary to the Text of the Commerce Clause and Foundational Understandings.

1. The Mandate and Penalty are Not Supported by the Text of the Commerce Clause.

Article I, § 8 of the Constitution provides that "The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." As the Commonwealth has previously noted in briefing the Secretary's motion to dismiss, classically educated Founders would have known that the word "commerce" is derived from the Latin *commercium*. *See* N. Baily, *Dictionarium Britannicum or a more complete Universal Etymological English Dictionary than any Extant* (London 1730); *A Pocket Dictionary* (3d ed. London 1765) (both available at The Library of Virginia Special Collections). Thus, they would have understood commerce as comprehending "traffick, dealing, merchandise, buying and selling, bartering of wares; also an intercourse or correspondence of dealing . . . ". Adam Littleton, *Dr. Adam Littleton's Latin dictionary, in four Parts: I. An English-Latin, II. A Latin-classical, III. A Latin-Proper, IV. A Latin-barbarous*, Part II (no pagination) (6th ed. London 1735) (Library of Va.). Had they consulted John Mair, *The Tyro's Dictionary, Latin and English* at 96 (2d ed. Edinburgh 1763) (Library of Virginia with autograph of P. Henry and of Patrick

Henry Fontaine), they would have seen *commercium* rendered as "trade, traffic, commerce, intercourse." Those who stopped with an English dictionary might have seen commerce defined as "trade or traffick in buying or selling." N. Baily, *supra*. This collection of terms is the way that the word has been historically understood both in language and law. Noah Webster in 1828 defined commerce as "an interchange or mutual change of goods, wares, productions, or property of any kind, between nations or individuals, either by barter, or by purchase and sale; trade; traffick." Noah Webster, *An American Dictionary of the English Language* at 42 (S. Converse New York 1828) (facsimile). These terms echo in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824) ("Commerce, undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."). *See also Black's Law Dictionary* at 304 (West 9th ed. 2008) ("The exchange of goods and services, especially on a large scale involving transportation between cities, states and nations.").

As Justice Thomas has noted, the founding generation distinguished between commerce on the one hand, and manufacturing or agriculture on the other, as distinct things. *Lopez*, 514 U.S. at 586 (Thomas concurring). However, there is nothing illogical about the Supreme Court's inclusion of manufacturing and agriculture within the modern understanding of commerce because they are similar and related things in a continuum of commercial activities. Nor was it illogical to hold that commerce consists of the whole of voluntary commercial activity in a certain commodity. *Wickard v. Filburn*, 317 U.S. 111, 114, 118-19 (1942). Even where an agricultural product is raised for home consumption, it is still part of the total stock which in the aggregate regulates and controls price through the law of supply and demand. *Id.*; *Gonzales v. Raich*, 545 U.S. 1 (2005).

In this respect, even *Wickard* and *Raich* fall short of doing violence to the understanding of the founding generation that commerce, industry, labor, agriculture, trade and navigation were all constituents of "a certain propensity in human nature . . . to truck, barter, and exchange one thing for another"; the end result of which was that mankind brought "the different produces of their respective talent . . . , as it were, into a common stock, where every man may purchase whatever part of the produce of other men's talents he has occasion for." Adam Smith, *Wealth of Nations*, at 9-10, 19, 22-23, 26, 81 (Prometheus Brooks Amherst N.Y. 1991) (facsimile). This is commerce. Its hallmarks are spontaneity and voluntary activity; not a command to buy something. The claim that commerce means not commercial activity but mere passivity is violently discordant with any normal use of the word commerce at the Founding or at any subsequent time. The claim that the word commerce means what the Secretary says it means treats the text of the Constitution with post-modernist disrespect.

2. The Historical Context in which the Commerce Clause was Drafted Makes it Highly Unlikely that it Included a Power to Command a Citizen to Purchase Goods or Services From Another Citizen.

As the Commonwealth noted in its opposition to the Secretary's motion to dismiss, the American Revolution and national independence resulted from parliament's claimed right to legislate for America. First, parliament passed the Stamp Act, only to see it repealed in the face of furious opposition. Then came the Townshend Acts, placing a duty on paper, glass, lead, paint and tea. As the struggle continued, all of the taxes except those on tea were repealed. That remaining tax, however, led to the Boston Tea Party, the Intolerable Acts, and the First Continental Congress. Throughout this period, from the Stamp Act forward, Americans responded with boycotts under the name of non-importation and non-consumption agreements.

The Declaration and Resolves of the First Continental Congress of October 14, 1774 "cheerfully consent[ed] to the operation of such acts of the British Parliament, as are bonfide,

restrained for the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother-country, and the commercial benefits of its respective members." However, the Continental Congress at the same time and in the same document promised "[t]o enter into a non-importation, non-consumption, and non-exportation agreement or association." Charles C. Tansill, *Documents Illustrative of the Formation of the Union of the American States Library of Congress Legislative Reference Service,* No. 398 (Government Printing Office 1927), *available at* http://avalon.law-yale.edu/18th_century/resolves.asp. Such boycott agreements were generally considered lawful even by the royal colonial governments. For example "[a]t New York the merchants held a meeting to join with the inhabitants of Boston; and against the opinion of the governor, the royal council decided that the meetings were legal; that the people did but establish among themselves certain rules of economy, and had a right to dispose of their own fortune as they pleased." George Bancroft, *History of the United States*, Vol. III at 287 (New York D. Appleton & Company 1896). Later, in the same colony "where the agreement of non-importation originated, every one, without so much as dissentient, approved it as wise and legal; men in high station declared against the revenue acts; and the governor wished their repeal." *Id.* at 359. In Massachusetts, Governor Hutchinson

> looked to his council; and they would take no part in breaking up the system of non-importation. He called in all the justices who lived within fifteen miles; and they thought it not incumbent to interrupt the proceedings. He sent the sheriff into the adjourned meeting of the merchants with a letter to the moderator, requiring them in his majesty's name to disperse; and the meeting of which justices of peace, selectmen, representatives, constables, and other officers made a part, sent him an answer that their assembly was warranted by law.

Id. at 369. Even where legislatures were dissolved to prevent the adoption of resolutions, the non-importation movement flourished. In Virginia, upon dissolution of the General Assembly,

the burgesses met by themselves and "adopted the resolves which Washington had brought with him from Mount Vernon, and which formed a well digested, stringent, and practical scheme of non-importation." "The assembly of Delaware adopted the Virginia resolutions word for word: and every colony South of Virginia followed the example." *Id.* at 348. In light of this experience, the founding generation would have regarded as preposterous any suggestion that Great Britain could have solved its colonial problems by commanding Americans to purchase tea under the generally conceded power of parliament to regulate commerce.

Additional historical arguments against the power of Congress to enact the mandate and penalty can be almost endlessly adduced. For example, Alexander Hamilton at the New York convention "not[ed] that there would be just cause for rejecting the Constitution if it would enable the Federal Government to 'penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals.'" *Lopez,* 514 U.S. at 592. What cannot be adduced is a countervailing historical example under the Commerce Clause in favor of the mandate and penalty.

3. There is No Tradition of Using the Commerce Clause to Require a Citizen to Purchase Goods or Services from Another Citizen.

"For nearly a century" after *Gibbons v. Ogden,* the Court's first Commerce Clause case, its "decisions . . . under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce." *Wickard,* 317 U.S. at 121. Whatever else might be said about these dormant or negative Commerce Clause cases, they seem to have advanced the core intent of the Commerce Clause, at least as understood by James Madison.

Writing in January 1788 in No. 42 of *The Federalist*, Madison addressed the regulation of Foreign and Indian Commerce without clearly differentiating them from Interstate Commerce. *The Founder's Constitution,* Vol. 2, Art. 1, § 8, Clause 3 (Commerce), Doc. 9, *available at* http://press-pubs.uchicago.edu/Founders/a1_8_3_commerces9.html. (Univ. of Chicago Press 2010). Years later he explained why in a letter dated February 13, 1829 to Joseph C. Cabel.

> For a like reason, I made no reference to the "power to regulate commerce among the several States." I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it, which, however just, might give birth to specious though unsound objections. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

Id.

There is a sense in which *Gibbons v. Ogden* can be viewed as a negative Commerce Clause case voiding a state transportation barrier. David P. Currie, *The Constitution in the Supreme Court the First Hundred Years 1789-1888* at 173 (Univ. of Chicago Press, 1985) ("This was the beginning of incessant litigation over the extent to which state legislation is precluded by the commerce clause"). As a consequence, it would be just to conclude that the Commerce Clause functioned just as Madison had expected for the first hundred years of national existence. However, beginning with the Interstate Commerce Act in 1887, the Sherman Antitrust Act in 1890, and many other enactments after 1903, Congress began asserting its positive power under the Commerce Clause. In doing so, it was met at first with significant checks from the Supreme Court. *Wickard,* 317 U.S. at 121-22, 122, n.20 (collecting cases striking down congressional enactments). In general, the Court protected state authority over intrastate commerce by

excluding from it "activities such as 'production,' 'manufacturing,' and 'mining,'" and by removing from its definition activities that merely affected interstate commerce, unless the effect was "direct" rather than indirect. *Id.* at 119-20. With respect to citizens, the reach of the Commerce Clause was limited by the Fifth Amendment which, prior to 1938, was held to protect economic liberty through substantive due process. *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935); *see also Lopez*, 514 U.S. at 606 (Souter, J. dissenting). Because this regime viewed the regulation even of economic activity as illegitimate unless that activity harmed or threatened harm to someone else, *Lochner v. New York*, 198 U.S. 45 (1905), it is inconceivable that the Commerce Clause prior to 1938 would have been deemed to validly reach inactivity. The question thus becomes, has the Supreme Court decided any case in the post-*Lochner* era that has extended the Commerce Clause far enough to cover the mandate and penalty? This Court, in denying the Secretary's motion to dismiss, has held that it has not. (Doc. 84 at 18, 25, 31) ("Never before has the Commerce Clause and associated Necessary and Proper Clause been extended this far.").

B. As this Court Found in Denying the Secretary's Motion to Dismiss, the Mandate and Penalty are Outside the Existing Outer Limits of the Commerce Clause and Associated Necessary and Proper Clause as Measured by Supreme Court Precedent.

Although *Wickard* has been described as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560, it still involved the voluntary activity of raising a commodity which, in the aggregate, was capable of affecting the common stock of wheat. Some of Mr. Filburn's commodities, as a matter of past practice, had been placed into commerce, and homegrown wheat in the aggregate would affect the total common stock, with a resulting effect on price. The Agricultural Adjustment Act of 1938 contained "a definition of 'market' and its derivatives, so that as related to wheat, in addition to

its conventional meaning, it also mean[t] to dispose of 'by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of.'" *Wickard*, 317 U.S. at 118-19. It was Filburn's practice to sell milk, poultry and eggs from animals fed with his home grown wheat. *Id.* at 114. The parties stipulated that the use of home grown wheat was the largest variable (greater than 20 per cent) in the domestic consumption of wheat. *Id.* at 125, 127. This, in turn, permitted the Supreme Court to hold that "even if [an] **activity** be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.* at 125 (emphasis added). This marks the affirmative outer limits of the Commerce Clause.

What *Wickard* stands for, as *Lopez* and *Morrison* make clear, is **not** the proposition that the case "expand[s] the commerce power to cover virtually everything," as used to be said. *See* Currie, *supra* at 170, n. 89. Instead, *Wickard* establishes the principle that, when activity has a substantial aggregate impact on interstate commerce, there is no as-applied, *de minimis* constitutional defense to regulation under the Commerce Clause. *See Raich*, 545 U.S. at 47-48 (O'Connor dissenting) ("The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis.")).

Wickard presented itself as a return to the pure and sweeping doctrine established by *Gibbons* following the Supreme Court's excursion into Lochnerism. *Wickard*, 317 U.S. at 119-25. However, the dictum of the *Wickard* Court that Chief Justice Marshall had made statements in *Gibbons* with respect to the Commerce Clause "warning that effective restraints on its exercise

must proceed from political rather than from judicial processes" is a tautology that conceals more than it reveals. *Wickard,* 317 U.S. at 120. It is a tautology because it is true of any enumerated power that, when Congress is validly acting under the power, the only effective restraints are political unless some other positive prohibition applies. *See Morrison*, 529 U.S. at 616, n. 7 (The "assertion that from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds* . . . *Gibbons* did not remove from this Court the authority to define that boundary.") (emphasis in original). What the *Wickard* tautology also conceals is Marshall's actual holding in *Gibbons* that the terms "to regulate" and "Commerce . . . among the several States" are bounded, with judicially ascertainable meaning, and his further holding that the Commerce Clause does not reach transactions that affect only intrastate commerce. *Gibbons,* 22 U.S. (9 Wheat.) at 189-90, 196.

Since *Wickard,* the Supreme Court has progressed no further than to hold that Congress can regulate three things under the Commerce Clause: (1) "use of the channels of interstate commerce" (2) "the instrumentalities of interstate commerce," and (3) "**activities** that substantially affect interstate commerce." *Lopez,* 514 U.S. at 558-59 (emphasis added); (Doc. 84 at 18-19 ("It appears from the argument and memoranda of counsel that only the third category is implicated in the case at hand.")). The majority in *Raich* (Stevens, Kennedy, Souter, Ginsburg and Breyer) went no further than to display a willingness to accept congressional findings that home-grown marijuana in the aggregate has a substantial effect on interstate commerce. *Raich,* 545 U.S. at 18-19. The challenge in *Raich* was not facial, but involved an atomized, as-applied challenge of the sort foreclosed by *Wickard*. *Id.* at 15, 23.

In addition to the affirmative, tripartite definition of the commerce power, the Supreme Court has developed a workable negative rule for determining when the outer limits of the Commerce Clause have been exceeded: a facial challenge will succeed when Congress seeks to regulate non-economic activities, particularly where the claimed power has no principled limits, requiring the Court "to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68. (Chief Justice Rehnquist for the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas) (citations omitted). As Justice Kennedy stated in his concurrence in *Lopez*: "Although it is the obligation of all officers of the Government to respect the constitutional design, the Federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Id.* at 578 (citations omitted).

That principle was found applicable in *Morrison* because the federal government was attempting to exercise police powers denied to it by the Constitution. *Morrison*, 529 U.S. at 618-19 ("'We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.'") (emphasis in original) (citations omitted). Not only are the mandate and its penalty provision a part of the police power conceptually, but historically, commands to act, such as vaccination and school attendance laws, have been justified under the state police power. *See Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("protection of the lives, limbs, health, comfort and quiet of all persons" falls within state

police power). Furthermore, the decision not to buy insurance is not itself even a part of the business of insurance.[1]

None of this is changed by the Secretary's appeal to the Necessary and Proper Clause. Each enumerated power of Congress is modified by this statement: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8. On May 17, 2010, the United States Supreme Court spoke to the meaning of the Necessary and Proper Clause in opinions that foreclose the use of the provision to sustain the mandate and its penalty provision. *United States v. Comstock*, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010). Beginning with the dissent, Justice Thomas and Justice Scalia categorically stated: "Under the Court's precedents, Congress may not regulate **non-economic activity** (such as sexual violence) based solely on the effect such activity may have, in individual cases or in the aggregate, on interstate commerce." *Id*. at 1973, 176 L. Ed. 2d at 908 (citing *Morrison* and *Lopez*) (emphasis added). Under that view, by definition, Congress cannot regulate based upon aggregation of the non-economic inactivity of not owning health insurance.

With respect to the concurrences, Justice Kennedy concurred because the civil commitment of federal prisoners at issue was a narrow, traditional function of the federal government that is not in competition with the general state police power. *Id*. at 1968, 176 L. Ed. 2d 902-3. Justice Alito concurred because the power to hold federal prisoners was supported

---

[1] Because the mandate and penalty are not regulation of the business of insurance within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq*., this Court need not decide whether the express waiver required by *Life Partners, Inc. v. Morrison*, 484 F.3d 284, 292 (4th Cir. 2007), *cert. denied*, 2007 U.S. LEXIS 12349 (Dec. 3, 2007), can be found in PPACA. (*See* Doc. 84 at 6, n.1). Commandeering the American people to purchase insurance is an attempted police power regulation of citizens, not a regulation of the business of insurance.

by deep history, going back to the First Congress, and the power of civil commitment is merely incidental to that ancient power. *Id*. at 1969-70, 176 L. Ed. 2d at 903-05.

The majority opinion upheld the law under a five part test: first, whether there is means-ends rationality between the enumerated power and the means chosen; second, whether the activity is one of long standing; third, if the reach of a longstanding practice is being extended, whether it is a reasonable one; fourth, whether the statute properly accounts for state interests; and fifth, whether the links between the means chosen and an enumerated power are too attenuated. *Id*. at 1956-63, 176 L. Ed. 2d at 889-97.

When the majority applied these factors to the facts of *Comstock*, they upheld the civil commitment statute because of "(1) the breadth of the Necessary and Proper Clause, (2) the long history of Federal involvement in this area, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in Federal custody, (4) the statute's accommodation of state interests [the States have a right of first refusal for custody upon release but historically have wanted nothing to do with paying for these federal prisoners], and (5) the statute's narrow scope." *Id*. at 1965, 176 L. Ed. 2d at 899.

Here, in contrast, (1) the rationality of the ends-means fit is weak because there is a traditional Anglo-American dislike of compulsion in financial transactions involving government, not only at the time of the Founding, but extending back to forced loans under the Stuarts; (2) the history of federal involvement is nonexistent; (3) the mandate and its penalty provision are not a reasonable extension of a pre-existing practice; (4) the asserted power represents a claim of police power in competition with that of the States, and (5) the claimed power has no principled limits. The Necessary and Proper Clause simply does not save the

Congressional overreach inherent in a command to purchase a good or service from another citizen under threat of a civil penalty.

Having demonstrated that the mandate and penalty are not comprehended within the outer limits of the Commerce Clause and associated Necessary and Proper Clause, it remains to be considered whether they can be supported as a lawful tax.

IV. THE MANDATE AND PENALTY CANNOT BE SUSTAINED UNDER THE TAXING POWER.

A threshold problem with the Secretary's resort to the taxing power is that no one can seriously call the **mandate** a tax. If the mandate is beyond the enumerated powers of Congress, it is unconstitutional. Furthermore, the penalty is a penalty, not a tax.

First, it should be remembered that it was Congress itself which called the payment for failure to comply with the mandate a "penalty," PPACA § 1501 at § 5000A(b)(1), and that the President similarly declared that it was not a tax. (Doc. 84 at 25) ("Contrary to pre-enactment representations by the Executive and Legislative branches, the Secretary now argues alternatively that the minimum essential coverage provision is a product of the government's power to tax for the general welfare."). Elsewhere in PPACA, Congress levied taxes denominated as such, demonstrating that it knew how to draw the distinction. *See, e.g.*, PPACA §§ 9001; 9004; 9015; 9017; 10907. In the taxing arena, the Supreme Court has refused to permit litigants to denominate as a tax that which Congress has denominated an exercise of commerce power. *Bd. of Trs. of the Univ. of Ill. v. United States*, 289 U.S. 48, 58 (1933) ("But if the Congress may thus exercise the power, and asserts, as it has asserted here, that it is exercising it, the judicial department may not attempt in its own conception of policy to distribute the duties thus fixed by allocating some of them to the exercise of the admitted power to regulate commerce and others to an independent exercise of the taxing power.").

Second, the penalty, speaking historically and in light of traditional norms, is simply not a tax. "'A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government.'" *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995), *quoting United States v. Butler*, 297 U.S. 1, 61 (1936). In contrast, the purpose of the penalty is to alter conduct in hopes that the penalty will not be collected at all.

Crucially for this case, the question whether an exaction is a tax or a penalty is justiciable. *See Rosenberger*, 515 U.S. at 841; *United States v. La Franca*, 282 U.S. 568, 572 (1931). Although "an Act of Congress which on its face purports to be an exercise of the taxing power," and which is actually a tax and not a regulatory penalty, will be upheld without collateral inquiry into the regulatory motive of Congress, *Sonzinsky v. United States*, 300 U.S. 506, 511, 513 (1937) (distinguishing *Child Labor Tax Case*), a true penalty is not a tax. *La Franca*, 282 U.S. at 572 ("The two words [tax vs. penalty] are not interchangeable . . . and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such.") (*quoted in* Doc. 84 at 26-27 n.7).

For nearly a hundred years, the United States Supreme Court has recognized that "taxes" and "penalties" are separate and distinct, stating that "'[a] tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996), *quoting La Franca*, 282 U.S. at 572. As the *La Franca* court held, the word "tax" and the word "penalty"

> are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of

> calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled . . . .

La Franca, 282 U.S at 572. To prevail, the Secretary's taxing power argument requires that this Court first ignore Congress's express decision to denominate the individual mandate penalty a "penalty," and then to "alter the essential nature" of the penalty by ignoring its function so that it can be called a tax. Because such steps would have the Court rewriting the statute, as opposed to interpreting it, the Secretary's argument must fail. Simply put, the taxing power does not and cannot provide the basis for the **penalty**.

Because the PPACA penalty is a penalty in contemplation of law, the following syllogism holds: If the penalty cannot be sustained under the Commerce Clause and associated Necessary and Proper Clause, it cannot be upheld as an exercise of the taxing power because it is not a penalty in aid of a tax. It is instead a naked penalty seeking in vain to attach itself to an enumerated power. As this Court stated in denying the Secretary's motion to dismiss, "Virginia correctly noted during oral argument that the power of Congress to exact a penalty is more constrained than its taxing power under the General Welfare Clause – it must be in aid of an enumerated power. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393, 60 S. Ct. 907, 912 (1940); *United States v. Butler*, 297 U.S. 1, 61, 56 S. Ct. 312, 317 (1936)." (Doc. 84 at 27).

The Constitution recognizes direct taxes, which must be apportioned, Art. I, § 9, and income taxes, which need not be apportioned, Amend. XVI, as well as duties, imposts and excises, which must be uniform throughout the United States. Art. I, § 8. These "apparently embrace all forms of taxation contemplated by the Constitution." *See Thomas v. United States*, 192 U.S. 363, 370 (1904) (pre-Sixteenth Amendment analysis of direct and indirect taxes). Historically, direct taxes were taxes on persons or things, while duties, imposts and excises have never meant a tax on a decision not to purchase or not to do something unrelated to a larger

voluntary business or other undertaking. And while the penalty was codified in the same act as actual excise taxes, excises historically consist of taxes imposed "on the production, sale, or consumption of certain commodities" or are business license taxes. *The American Heritage Dictionary* 457 (Houghton Mifflin Co. Boston 1981).

Moreover, even if the penalty were a tax, as long as it is being used for regulation, it must pass muster under an enumerated power other than the taxing power justifying the regulation. *Child Labor Tax Case*, 259 U.S. 20 (1922). *See also R.R. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468-69 (1982) (alternative power will not be used to support enactment if it evades the limits of another grant). As this Court noted in its prior opinion, Virginia contends that "'[t]he law is that Congress can tax under its taxing power that which it can't regulate, but it can't regulate through taxation that which it cannot otherwise regulate.' (Tr. 81; 18-21, July 1, 2010 (citing *Bailey v. Drexel Furniture Co.* (*Child Labor Tax Case*), 259 U.S. 20, 37, 42 S. Ct. 449, 450 (1922))." (Doc. 84 at 27-28). *See also Butler*, 297 U.S. at 68; *Linder v. United States*, 268 U.S. 5, 17-18 (1925). Although "the Secretary maintains that this line of cases has fallen into desuetude," (Doc. 84 at 28), such an argument is not available to her outside of the Supreme Court. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions") (cited with approval in *United States v. O'Brien*, 130 S. Ct. 2169, 2174, 176 L. Ed. 2d 979, 986 (2010)).

Because these controlling cases have not been overruled, they are binding at this stage of the litigation.[2]

Ultimately, the problem with the tax argument is the same problem as with the Commerce Clause argument: it is anti-textual, anti-historical and contrary to precedent. The imposition of a penalty for failing to obey a command to do what the government wants is neither the regulation of commerce nor taxation; it is an exercise of police power denied to the federal government.

V. THE FACT THAT THE MANDATE AND PEANLTY ARE BEYOND THE OUTER LIMITS OF THE COMMERCE CLAUSE IS FATAL TO THE SECRETARY'S CASE.

Courts inferior to the Supreme Court should consider themselves constrained by the rule of *Rodriquez de Quijas*, 490 U.S. 477, and thus, must reject the Secretary's invitation to extend existing precedent in order to uphold the mandate and penalty. If the penalty is deemed a tax, it is a regulatory tax. Under the *Child Labor Tax Case* and *United States v. Butler*, a regulatory tax must be supported by an enumerated power separate and apart from the taxing power. But this Court should never reach that issue under *Rodriquez de Quijas* because, under *La Franca*, the penalty is not a tax but a naked penalty. As such it requires an enumerated power for its support. The penalty is not in aid of the taxing power because the mandate is not a tax. Because the Commerce Clause is the only other conceivable enumerated power available to support the penalty, the tax argument collapses back into the Commerce Clause inquiry.

[2] Even if the penalty were deemed to be a non-regulatory tax – a legal impossibility under existing precedent – it would still be unconstitutional either as an unapportioned capitation tax or as a non-uniform excise. It is non-uniform because the contents of the mandated policy of insurance triggering it is not geographically uniform.

This Court should decline the Secretary's invitation to extend *Wickard* and *Raich* because legal precedent is customarily extended incrementally by analogy, and there is nothing analogous between commodity regulation and the mandate. Under *Rodriquez de Quijas*, this Court is not authorized to extend the negative outer limits of the Commerce Clause established by *Lopez* and *Morrison*. Again, as the Supreme Court said in *Morrison*: "We *always* have rejected readings of the Commerce Clause and the scope of Federal power that would permit Congress to exercise a police power." *Morrison*, 529 U.S. at 618 (emphasis in original). This statement is sweeping and categorical. It applies alike to all sources of Federal power and not just to the Commerce Clause. Because the claimed power to force a citizen to buy a good or service from another citizen is without principled limits, it is indistinguishable from a national police power, and therefore, is contrary to *Morrison*.

In the end, the Secretary is relegated to an argument under the Necessary and Proper Clause that the claimed power to enact the mandate and penalty, although anti-textual, anti-historical and beyond the outer limits of anything recognized before, is just too important under Congress's scheme to be allowed to fail. At the close of its last term, the Supreme Court had occasion to address this form of special pleading in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).

> Calls to abandon [constitutional] protections in light of "the era's perceived necessity," *New York*, 505 U.S. at 187, are not unusual. Nor is the argument from bureaucratic expertise limited only to the field of accounting. The failures of accounting regulation may be a "pressing national problem," but "a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." *Id.* at 187-188.

Id. at 3157, 177 L. Ed. 2d at 728.[3] The Secretary's argument from necessity is insufficient because, under *Morrison*, any claim of power that collapses Federalism into a national police power cannot both be necessary **and proper**. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) at 421 (for an exercise of power to satisfy the Necessary and Proper Clause it must "consist with the letter and spirit of the constitution".).

In the end, the Secretary's invitation to extend the negative outer limits of the Commerce Clause, and associated Necessary and Proper Clause, is an argument that can only be preserved in this Court but not acted upon. Under *Rodriquez de Quijas*, the invitation could be accepted only in the Supreme Court. Even there, the deeply historical approaches adopted in *Comstock* and *Free Enterprise Fund* suggest that the Secretary's invitation will be rebuffed.

VI. THE UNCONSTITUTIONAL MANDATE AND PENALTY ARE NOT SEVERABLE FROM THE REMAINDER OF THE ACT, AND THEREFORE, PPACA FAILS IN ITS ENTIRETY.

To determine whether an unconstitutional provision of a congressional enactment is severable from the remainder of the enactment, the Court's review is governed by the test found in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). Applying the *Alaska Airlines* test to PPACA, a finding that the mandate and penalty are unconstitutional leads inexorably to the conclusion that PPACA must be struck down in its entirety.

First, Congressional enactments containing severability clauses are entitled to "a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines*, 480 U.S. at 686. PPACA does not contain such a clause, and thus, the Secretary is not entitled to that presumption.

---

[3] Chief Justice Roberts also quoted language from the dissent from the Court of Appeals: "Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity." *Id.* at 3159, 177 L. Ed. 2d at 731.

Second, this case offers the clearest possible example of non-severability under *Alaska Airlines*. In *Alaska Airlines*, the Supreme Court stated the test for determining whether an unconstitutional provision is severable from the entire enactment in these terms:

> The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.
>
> Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently.

Id. at 684. (internal quotations and citations omitted). Accordingly, a court may not sever an unconstitutional provision from the rest of a statute if, without the unconstitutional provision, the statute would not "function in a *manner* consistent with the intent of Congress . . . . ," because such an enactment "is legislation Congress would not have enacted." *Id*. at 685 (emphasis in original).

Attempting to determine whether an enactment would function "consistent[ly] with the intent of Congress" often requires trying to divine the intent of Congress by considering materials that were not actually part of the final enactment, such as legislative history. However, resort to such materials is not necessary in the instant case because Congress made clear on the face of PPACA that the statutory scheme cannot work as Congress intended without the mandate and penalty.

For example, in §§ 1501(a)(2)(H) and 10106(a) of PPACA, Congress explicitly stated that the mandate "is an **essential** part of this larger regulation of economic activity, and the absence of the [mandate and penalty] would undercut Federal regulation of the health insurance market." (emphasis added). Congress continued, noting in §§ 1501(a)(2)(I) and 10106(a) of PPACA that the mandate and penalty,

> **together with the other provisions of this Act**, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The [mandate and penalty are] **essential** to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

(emphasis added). Furthermore, in §§ 1501(a)(2)(J) and 10106(a) of PPACA, Congress again stated that the mandate and penalty were necessary for PPACA to work as Congress intended, noting that the mandate and penalty,

> **together with the other provisions of this Act**, will significantly reduce administrative costs and lower health insurance premiums. The [mandate and penalty are] **essential** to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

(emphasis added). Thus, in the enactment itself, Congress found that the mandate and penalty are intertwined with the other provisions of PPACA and that the mandate and penalty are essential to the functioning of PPACA as intended by Congress. Given that Congress made such explicit findings, it can be said to a certainty that PPACA, without the unconstitutional mandate and penalty, will not "function in a manner consistent with the intent of Congress . . . . ," and therefore, the mandate and penalty may not be severed from the remainder of PPACA under the *Alaska Airlines* test.

In addition to these explicit references within PPACA, the Secretary has effectively conceded the point away. At the July 1, 2010 hearing on her motion to dismiss, the Secretary consistently and repeatedly argued that the mandate and the penalty were essential to PPACA's broader legislative scheme. Specifically, the Secretary argued that, without the mandate and penalty, PPACA would destroy the American health insurance market, stating

> And what the testimony was, was if you do the preexisting condition exclusion and no differential health care status, **without a minimum coverage type provision, it will inexorably drive the market into extinction.** And what

> somebody said more succinctly was, the market will implode. And that's what Congress had before it.
>
> **So then what Congress did** [in enacting the mandate and penalty] **was as necessary as could be to making those other reforms work. . . . [H]ere it really was necessary.**

July 1, 2010 Tr., at 33, ln. 7-18. (emphasis added). The Secretary continued this theme throughout the hearing, making this same point over and over again:

> [The mandate and penalty] **really is necessary**. What the Court would be saying [by finding the mandate and penalty unconstitutional] is effectively the Congress could not, could not pass those insurance reforms [found elsewhere in PPACA] . . . . [The mandate and penalty are] **actually necessary**. . . . It's not like [the mandate and penalty] **would be a great thing to have. It's actually essential.** The market will implode [without the mandate and penalty].

Id. at 35, ln. 22-36, ln. 3.

In response to a question from the Court that attempted to draw a distinction between the mandate and penalty and the other portions of PPACA, the Secretary rejected the proposition that such a distinction was even possible, stating

> **One can't exist without the other**, Your Honor. That is what the testimony is. And **that's what Congress found. That is, if you have one without the other, the market implodes. The two go hand in hand.**
>
> And that wasn't just abstract economic testimony. **They were looking at the experience of states like New Jersey who tried to do sort of one without the other, and it doesn't work.**

Id. at 36, ln. 10-17.

Even in her rebuttal argument, the Secretary continued to steadfastly maintain that PPACA could not work as Congress intended without the mandate and penalty, stating

> It's not just rationally related, reasonably related, it's necessary. What Congress found, and what the testimony before Congress was, the market would go into extinction or it would implode. **It actually was essential to make the reforms work.**

Id. at 99, ln. 11-17. (emphasis added). Based on the Secretary's own arguments at the motion to dismiss hearing, there is no question that PPACA, without the unconstitutional mandate and penalty, will not "function in a manner consistent with the intent of Congress . . . . ," and therefore, the mandate and penalty may not be severed from the remainder of PPACA under the *Alaska Airlines* test.

In addition to her arguments at the July 1, 2010 hearing, the Secretary has consistently and repeatedly argued that the mandate and the penalty were essential to PPACA's broader legislative scheme in her written filings. In Paragraph 14 of her Answer, the Secretary avers that the mandate and penalty are "essential to ensure the success" of PPACA's regulatory scheme. (Doc. 87 at 3 Par. 14). In her Memorandum in Support of Her Motion to Dismiss, the Secretary described the individual mandate and associated penalty being challenged here as "**a linchpin of Congress's reform plan**." (Doc. 22 at 3). (emphasis added). Elsewhere in her Memorandum, she said that "**Congress determined that, without the minimum coverage provision, the reforms in the Act . . . would not work**." (*Id*. at 4) (emphasis added). (*See also* Doc. 22 at 8, 30-35, Doc. 77 at 2, 9, 14, 15). Under the *Alaska Airlines* test, when something is the "linchpin" of a legislative enactment, and Congress has determined that the enactment "would not work" without it, it is not severable. Accordingly, based on the statements in PPACA itself and the arguments advanced by the Secretary in this case, no credible argument can be made that the unconstitutional mandate and penalty are severable from PPACA. Accordingly, PPACA must be stricken in its entirety.

VII. IN ADDITION TO DECLARING PPACA UNCONSTITUTIONAL AND DECLARING THE VIRGINIA HEALTH CARE FREEDOM ACT TO BE A VALID EXERCISE OF SOVEREIGN POWER, THE COURT SHOULD ENJOIN THE SECRETARY FROM FURTHER IMPLEMENTATION OF PPACA.

Once the Court has declared that the Virginia Health Care Freedom Act is a valid exercise of the Commonwealth's sovereign power and that the mandate and penalty are unconstitutional; that the mandate and penalty are not severable from the remainder of PPACA; and that the entirety of PPACA is therefore unconstitutional; the issue becomes one of injunctive remedy. Applying the relevant legal standard to this case, it is clear that the Commonwealth is entitled to a permanent injunction that bars the Secretary from taking any steps to further implement PPACA.

The standard for granting a permanent injunction is clear. As the United States Supreme Court held in June,

> "[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."

Monsanto Co. v. Geerston Seed Farms, 130 S. Ct. 2743, 2756, 177 L. Ed. 2d 461, 476 (2010), *quoting eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The Commonwealth satisfies all four factors.

A. The Commonwealth's Sovereign Injury Constitutes Irreparable Harm.

In ruling on the Secretary's motion to dismiss, this Court found that "the effect of the federal enactment is to require Virginia to yield under the Supremacy Clause . . . ." and that "the Virginia statute is directly in conflict with Section 1501 of the Patient Protection and Affordable

Care Act." (Doc. 84 at 6) (footnote omitted)). Thus, once PPACA has been found to violate the Constitution, there can be no question that the implementation of PPACA constitutes a continuing and irreparable sovereign injury to the Commonwealth. *See also Diamond v. Charles*, 476 U.S. 54, 65 (1986) (finding that a challenge to a State's sovereign power to enforce its legal code constitutes an Article III injury). The purported override of the Virginia Health Care Freedom Act is irreparable harm with respect to a sovereign. *Cf. Elrod v. Burns*, 427 U.S. 347, 373-74 (1976).

B. The Remedies Available at Law, Such as Monetary Damages, are Inadequate to Compensate for the Commonwealth's Injury.

The injury suffered by the Commonwealth—the insult to its sovereign prerogatives—is simply not redressable by traditional legal remedies. No one can seriously argue that a monetary damage award can be crafted to address the federal government's violation of the Commonwealth's sovereignty through a claim to powers prohibited to the federal government by the Constitution. The only way that the Commonwealth's sovereign interests may be vindicated is for the Court to recognize that PPACA represents a violation of those interests and to then enjoin the Secretary from her continuing efforts to implement the unconstitutional scheme.

C. Considering the Balance of Hardships Between the Commonwealth and the Secretary, a Remedy in Equity is Warranted.

The Secretary has no valid interest in continuing to implement an unconstitutional statute. *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983) ("the INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations."). On the other hand, the Commonwealth has an interest in protecting its sovereignty and in avoiding the present burdens placed upon it by an unconstitutional statute and the Secretary's attempts to implement the same. (Declaration of Sec'y Hazel). Hence, once this Court determines that

PPACA is unconstitutional, there is no question that the balance of the hardships between the Commonwealth and the Secretary dictates that the injunction be entered.[4]

D. The Public Interest Would not be Disserved by a Permanent Injunction.

The public has no interest in the enforcement of an unconstitutional measure. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("upholding constitutional rights surely serves the public interest"). Instead, continuing exactions and requirements under authority erroneously claimed under the unconstitutional measure can only cause public harm. Ultimately, regardless of Congress's intentions or the significance of the perceived problem that PPACA seeks to address, it is **never** in the public interest for the Congress to choose an unconstitutional "solution" or for the Court to countenance such a Congressional choice. As the United States Supreme Court has held,

> Some truths are so basic that, like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. . . . [Something may be a] pressing national problem, but **a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse**.

New York v. United States, 505 U.S. 144, 187-88 (1992) (emphasis added). *See also Free Enterprise Fund*, 130 S. Ct. at 3157, 177 L. Ed. 2d at 728. Because the public is not

[4] Whether the injunction should be stayed pending appeal is a separate question on which the Secretary has the burden of going forward as well as the burden of proof.

served by the Secretary's continuing efforts to implement an unconstitutional scheme, this Court should enjoin her from further attempts to do so.

VIII. THIS COURT SHOULD GRANT SUMMARY JUDGMENT TO THE COMMONWEALTH ON THE SECRETARY'S AFFIRMATIVE DEFENSES.

The Secretary has pled seven affirmative defenses in her answer. Affirmative defenses 1-5 and 7 plead matters that were, or which could have been, raised in her motion to dismiss under the headings of standing, ripeness, anti-injunction act and failure to state a claim. (Doc. 8 at 5-6). Further proceedings on those issues are governed by the law of the case doctrine, and the Commonwealth is entitled to judgment on them as a matter of course. *Arizona v. California*, 460 U.S. 605, 618-19 (1983).

In her sixth affirmative defense, the Secretary seeks dismissal of the case for failure to join the Secretary of the Treasury as a necessary party. Dismissal is a legal impossibility because dismissal can only be had if an indispensable party cannot feasibly be joined. Fed. R. Civ. P. 19. No such issue of joinder of such a person is implicated here, and thus, dismissal is not an available result. If, however, the Secretary is seeking joinder of an additional party under Rule 19(a), that motion has been waived. As then Judge, now Justice, Kennedy wrote in *Citibank v. Oxford Properties & Finance Ltd.*, 688 F.2d 1259, 1263 n.4 (9th Cir. 1982), "[i]n Federal procedure, failure to join necessary parties is waived if objection is not made in defendant's first responsive pleading."

The interplay between Rule 12 and Rule 19 works in this fashion. A person is an indispensable party under Rule 19(b) if he is a necessary party who cannot be feasibly joined. Because the Secretary of the Treasury could be feasibly joined, he is not a Rule 19(b) indispensable party. The claim that the Secretary of the Treasury is a Rule 19(a) "necessary

party is waived if not raised in the defendant's first responsive pleading." *Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Union #1 v. Nationwide Precast Specialists, Inc.*, 1992 U.S. Dist. LEXIS 8969 * 6-7 (N.D. Ill. June 23, 1992). Because the non-waiver provision of Rule 12(h)(2) "only applies to the defense of failure to join an indispensable party," *id.*, the failure to raise the necessary party claim in the Secretary's motion to dismiss is a waiver. *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 148 (D.D.C. 1999) ("The timeliness requirements of Rule 12(h) counsel that in federal procedure, failure to join necessary parties is waived if objection is not made in defendant's first responsive pleading; it is only the absence of an indispensable party which may (possibly) be raised later.'") (citing *Citibank*).

Waiver aside, the Secretary of the Treasury is not a Rule 19(a) Necessary Party because his absence does not prevent the Court from "accord[ing] complete relief among existing parties," Rule 19(a)(1)(A), nor is he a person who "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Rule 19 (a)(1)(B).

The Secretary of the Treasury is not such a party, because if the mandate and penalty are unconstitutional and are unseverable as the Commonwealth contends, PPACA will fall before the duties of the Secretary of the Treasury accrue. Furthermore, if the Department of Justice actually thought that the Secretary of the Treasury was necessary, it would not have omitted the claim from its motion to dismiss. Indeed, if it had thought he was necessary, a mere suggestion to that effect at the pretrial conference would have permitted the Court to add him on its own

motion under Rule 21, Fed. R. Civ. P. Posturing the issue as a pleading defect is simply not credible. *See* 2-12 Moore's Federal Practice – Civil § 12.35C.

Finally, even were the Court to agree that the Secretary of the Treasury is necessary within the meaning of Rule 19(a), the remedy would be to direct the Commonwealth to add him, which it would do as a matter of course.

CONCLUSION

WHEREFORE, this Court should grant Summary Judgment to the Commonwealth declaring PPACA unconstitutional, declaring the Virginia Health Care Freedom Act to be a valid exercise of sovereign power and enjoining the Secretary from further implementation of PPACA.

Respectfully submitted,

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

E. DUNCAN GETCHELL, JR.
State Solicitor General

WESLEY G. RUSSELL, JR.
Deputy Attorney General

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel

/s/ E. Duncan Getchell, Jr.
E. Duncan Getchell, Jr., VSB #14156
Attorney for Commonwealth of Virginia
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (Telephone)
(804) 786-1991 (Fax)
dgetchell@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2010, I electronically filed the foregoing Memorandum in Support of Motion for Summary Judgment with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to: Ian Gershengorn, ian.gershengorn@usdoj.gov, Joel McElvain, joel.mcelvain@usdoj.gov, Jonathan Holland Hambrick, jay.h.hambrick@usdoj.gov, Sheila M. Lieber, slieber@civ-usdoj.gov, and all counsel for Amici. A copy also has been served by first class, postage prepaid, U.S. Mail to Ray Elbert Parker, *Pro Se*, P. O. Box 320636, Alexandria, VA 22320.

/s/ E. Duncan Getchell, Jr.
E. Duncan Getchell, Jr., VSB #14156
Attorney for Commonwealth of Virginia
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (Telephone)
(804) 786-1991 (Fax)
dgetchell@oag.state.va.us